Fibula Air Travel Srl v Just-Us Air Srl: To Amend or Not to Amend? A Tale of Issue Estoppel and *Henderson* Abuse

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The High Court in *Fibula Air Travel Srl v Just-Us Air Srl* [2023] EWHC 1049 (Comm) has recently analysed and applied the doctrines of issue estoppel and *Henderson* abuse in the context of the Claimant's application for permission to amend pursuant to CPR 17.1(2).

Background

The Claimant, Fibula Air Travel Srl ("Fibula") is a Romanian company that sells package holidays to various destinations. The Defendant, Just-Us Air Srl ("Just-Us") is also a Romanian company that offers wet leases (i.e., leases whereby the lessor provides not only the aircraft, but also the crew, maintenance and insurance).

The underlying dispute between the parties related to the return of a security deposit paid by Fibula pursuant to an aircraft lease on the basis that the lease had been terminated for repudiatory breach. Fibula pleaded, in the alternative, arguments related to force majeure and the frustration of the lease agreement in light of the restrictions imposed by certain governmental authorities as a result of the COVID-19 pandemic (the "Restrictions"). Just-Us also advanced a counterclaim claiming payment of the stage payments under the lease.

Just-Us applied for reverse summary judgment in April 2021, seeking dismissal of Fibula's claim. The application was successful. In particular, HHJ Pelling (who heard the application) held that Fibula's claim had no realistic prospect of success, given that: (i) Just-Us was not in repudiatory breach at the time as it had no obligation to do anything until Fibula made the first of the stage payments; and (ii) the Restrictions did not constitute force majeure and did not amount to frustrating events. Fibula was subsequently refused permission to appeal to the Court of Appeal on the basis that it would have no real prospect of success.

The summary judgment application did not include the counterclaim advanced by Just-Us and Fibula subsequently sought to amend its Reply and Defence to the Counterclaim in order to introduce new defences. The main amendments were threefold and related

to: (i) the "Audit Defence" (i.e., that Fibula's payment obligations under the lease never arose because of Just-Us' failure to complete a successful audit, (ii) the "Approvals Defence" (i.e., that the lease never came into force because the relevant authorisations as required by the Approvals Condition had not been obtained from the relevant civil aviation authorities) and (iii) the "Frustration Defence" (i.e., that the lease was frustrated when flights between Romania and Turkey were suspended as a result of the COVID-19 pandemic). Just-Us objected to the proposed amendments on the basis that they amounted to a collateral attack on the summary judgment and that they were either *res judicata* by virtue of an issue estoppel or abusive pursuant to the principle formulated in *Henderson v Henderson*.[1]

Permission to Amend

Fibula did not dispute the fact that it required permission to amend under CPR Part 17.1(2). The High Court emphasised that, in deciding whether to grant permission to amend, it had a broad discretion which required it to consider all the relevant circumstances, including:

- whether the amendments had some prospects of success (i.e., essentially the same test as for summary judgment);
- the overriding objective that cases should be dealt with justly and at proportionate cost;
- the balance of prejudice; and
- in the event that the amendment was made late, the reasons for that delay and the impact of allowing a late amendment.

The Court then considered the arguments concerning issue estoppel and Henderson abuse, advanced by Just-Us.

Estoppel by *Res Judicata* and *Henderson* Abuse

The Court considered a large body of authorities on estoppel by *res judicata* (i.e., issue estoppel and cause of action estoppel) and *Henderson* abuse and condensed the relevant principles. In short, the key principles are as follows:

[1] (1843), 3 Hare 100.

- Once a cause of action has been held to exist (or not to exist), the parties are barred from asserting an identical cause of action in subsequent proceedings, by virtue of cause of action estoppel.

- Even where the subsequent proceedings involve a different cause of action, a decision on a particular issue which formed a "*necessary ingredient*"[2] of the earlier cause of action and is also relevant to the subsequent cause of action is binding on the parties and the parties are not allowed to reopen that issue. This is known as "issue estoppel."

  - The relevant question in respect of issue estoppel is whether resolution of the issue was a "*necessary step*" to the decision or a "*matter which it was necessary to decide and which was actually decided, as the groundwork of the decision*."[3] The determination must be so fundamental to the substantive decision that the latter cannot stand without the former.

  - To ascertain the above, one may look not only at the judgment but also at the pleadings, evidence and, if necessary, other material in order to show what issue was actually decided.

- The *Henderson* principle (i.e. the principle preventing litigants from advancing causes of action or arguments that they could have advanced in earlier proceedings, where the Court made it clear that parties "*must bring forward their whole case*" where "*a given matter becomes the subject of litigation*") is not exclusively confined to abuse of process. It overlaps with and qualifies the doctrine of *res judicata* by injecting a degree of flexibility in the application of the latter. The flexibility allowed in cases of issue estoppel is greater than in cases of cause of action estoppel.

- The principles of issue estoppel and *Henderson* abuse can apply not only in the context of separate sets of proceedings, but also in the context of the same litigation.[4]

- The fact that a point could have been raised in earlier proceedings does not necessarily mean that it should have been, so as to make it abusive to do so subsequently. The court should adopt a broad, merits-based approach. The court should ask if, in all the circumstances, the party raising the issue is misusing or abusing the process of the court.

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[2] *Arnold v National Westminster Bank plc* [1991] 2 AC 93, per Lord Keith.

[3] *Seele Austria GmbH Co v Tokio Marine Europe Insurance Lrd*, [2009] EWHC 255 (TCC).

[4] i.e., where the relevant issue arises at a subsequent stage of the same litigation, for example after a trial of preliminary issues or a summary judgment.

Decision

Applying the above principles, the Court granted Fibula permission to amend in respect of the Audit Defence and Approvals Defence, as it did not consider that the doctrines of issue estoppel or *Henderson* abuse would be engaged in respect of these defences.[5] In particular:

- The doctrine of issue estoppel did not operate to bar the Audit and Approvals Defences, as the points relevant to these defences were not pleaded before HHJ Pelling and were therefore not "issues" for the purposes of issue estoppel. At most, to the extent that HHJ Pelling made findings that were relevant to the Audit Defence, these were "*decision[s] on the facts divorced from their legal consequences*", as opposed to resolving a specific dispute as to whether the audit had been passed. For substantially the same reasons, the Court also concluded that the Approvals Defence should be allowed to proceed. More specifically, Fibula never pleaded or argued before HHJ Pelling that the lease never came into effect at all because the requisite approvals had not been obtained.

- As to *Henderson* abuse, the Court did not consider it abusive to permit Fibula to rely on the Audit and Approvals Defences. This was on the basis that (among other things):

  - The subject matter of the litigation before HHJ Pelling was the summary determination of the claim, not the counterclaim. As the judge noted, there was never going to be finality in relation to the dispute between the parties while the counterclaim remained alive. Had Just-Us wanted such finality, it should have included the counterclaim in its summary judgment application as "*[t]he position would undoubtedly have been very different if it had.*"

  - It was "*highly relevant*" that this was not a case where Fibula was seeking to harass or vex Just-Us. On the contrary, it was a case where Fibula was merely seeking to defend itself against the counterclaim brought by Just-Us.

  - Although Fibula had "*every opportunity*" to run the relevant points at the summary judgment application, the Court reached the view (after considering the balance of prejudice) that the prejudice to Fibula in being denied the right to defend itself against a €5 million counterclaim outweighed Just-Us' right not to be harassed or vexed by multiple proceedings.

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[5] Note that Just-Us subsequently sought permission (from the same court and, following the court's refusal to grant said permission, from the Court of Appeal) to appeal but this was refused.

The Court, however, refused permission to amend[6] in relation to the Frustration Defence. This was on the basis of issue estoppel, given that Fibula had already "*clearly pleaded and argued*" the point regarding supervening illegality (i.e., a sub-species of frustration) before HHJ Pelling. Fibula was therefore not allowed (by virtue of issue estoppel) to rely on "*precisely the same events*" in support of the Frustration Defence and to adduce new evidence in this regard.

Key Takeaways

- The judgment sets out a helpful analysis of the principles underpinning *res judicata* and *Henderson* abuse.
- A finding of *Henderson* abuse is less likely where (as in this case) the Claimant does not seek to harass or vex the Defendant.
- The case also serves as an important reminder to all parties involved in litigation to "*bring forward their whole case*." Otherwise, litigants take the risk of being denied the opportunity to advance relevant causes of action or arguments at a later stage, if the court finds that these could have (and should have) been advanced in earlier proceedings. In other words, having a second bite at the cherry might not be possible if *res judicata* or *Henderson* abuse are engaged.

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[6] It is worth noting that Fibula advanced a fourth defence, namely the "**Furlough Defence**" (i.e., that Just-Us should give credit for furlough payments received by Just-Us in respect of its workforce). The Court dealt with this very briefly and refused to give permission to amend on the basis that this defence clearly had no prospects of success. There was no connection between the furlough payments and Fibula's own contractual obligations under the lease that would justify the credit as claimed. Fibula itself *"did not consider* [the Furlough Defence] *worthy of even honourable mention"* in the skeleton argument or oral submissions.

Please do not hesitate to contact us with any questions.

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